

TESTIMONY OF GARY S. GUZY
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY,
NATURAL RESOURCES AND REGULATORY AFFAIRS

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Mr. Chairman and Members of the Committee, thank you for inviting me to appear today. I am very pleased to provide my views on the elevation of the U.S. Environmental Protection Agency (EPA) to cabinet level status. I commend Chairman Ose for his continued leadership in addressing this important issue.

I come before you with two decades of environmental law experience, having had the privilege of serving as EPA's General Counsel during the prior Administration, having practiced in the private sector, and having represented EPA during my tenure at the Department of Justice.

I believe that it is important to provide our nation with all of the necessary tools to protect fully public health and the environment, and this includes having a Cabinet level Department of Environmental Protection. I therefore urge the Committee to seize the current opportunity to once and for all accomplish this change, but caution that it may only be achievable if the implementing legislation is straightforward and unencumbered by limitations on EPA's authority. I therefore urge you to support H.R. 37, introduced by Congressman Sherwood Boehlert, complemented by a high level process designed to improve EPA's operations.

Ratifying the EPA's Accomplishments and Equipping It for Future Challenges

Our nation has much to be grateful for when it comes to the environment and the work of EPA. Through its consistent efforts over the last 30 years -- in partnership with states, tribes, businesses, and the advocacy community -- many aspects of our environment have gotten cleaner and the health of Americans has improved, even while our economy has grown. We have seen major air pollutants decrease by some 30% since 1970, at the same time as vehicle miles traveled have increased by 145% and U.S. energy consumption has increased by 40%. *EPA's Draft Report on the Environment 2003*. We have seen significant portions of our Nation's landscape and waterways returned to health, public enjoyment, and resultant economic prosperity. Much of this progress has been the result of EPA's efforts to carry out the farsighted set of major environmental laws created by Congress, in a spirit of bi-partisanship, in the 1970's.

These improvements are not a reason, however, to let down our guard. We still face major environmental and public health challenges in the areas where EPA has not been as active or where the problems remain persistent. These include continuing smog in populous regions that leads to premature deaths, restrictions on outdoor activities, and respiratory ailments. They include contamination of waterways so that fish are inedible and beaches are closed for

swimming. They include seemingly inexplicable clusters of childhood cancers and increasing evidence of endocrine disruption in adults. They include mounting evidence of large scale global warming.

The National Academy of Public Administration has identified three priority areas on which EPA should focus its future efforts, each of which poses complex challenges beyond addressing end-of-pipeline industrial pollution from large sources. These are: reducing nutrients in watersheds resulting from non-point source pollution; controlling the many sources of ground-level ozone and smog; and clarifying the choices the Nation must make to bring about a reduction in carbon dioxide and other greenhouse gases. National Academy of Public Administration (NAPA), *Environment.gov: Transforming Environmental Protection for the 21st Century* (2000); Statement of Dr. Janet L. Norwood before the Subcommittee (Sept. 21, 2001).

An agency grappling with these complex issues has a vast effect upon the everyday lives of Americans in communities across our Nation. In the scope and importance of its work, in its budget and economic impact, and in the international consequences of its actions, it should be apparent that EPA is engaged in cabinet-level work. That status should be recognized for symbolic reasons, but also to ensure that our country is optimally equipped to confront these critical and difficult issues. As William Reilly, who served as EPA Administrator during the first Bush Administration, put it, "A more contemporary understanding that EPA is uniquely the environmental overseer, watchdog, and point of reference regarding the status, needs and problems of ecology and environmental health in America, compels a broad view of the agency's role." Testimony by William K. Reilly before the Committee on Governmental Affairs, U.S. Senate (July 24, 2001). This is a view far better captured by a cabinet level department.

Not Getting There and Unintended Consequences

There is ample reason to be concerned that, however lofty this goal, it may not be attained if the effort to secure cabinet elevation is also seen as an opportunity for adding new restrictions on EPA's operations. The history of efforts to elevate EPA to a cabinet agency could not be clearer. In 1988, 1991, 1993-94, and again in 2001, these efforts have stalled because an unencumbered approach became laden with the particular concerns of various Members of Congress. These proved to be controversial enough to halt this important project. Let us not make this same mistake again.

Some of the proposals for changes I have seen --such as housing peer review outside of EPA in the National Academy of Sciences -- do not seem designed to better equip a new Department. Rather, they seem designed to hobble EPA and to prevent it from carrying out its responsibilities.

We should be skeptical when we hear "sound science" being used as the justification for a change. In the late 1990's, during my tenure at the Agency, the poster child for bad science repeatedly cited by Congress and industry was the epidemiological basis for EPA's association of elevated fine particles and premature deaths. These criticisms ignored the extensive peer review that had occurred, both outside the Agency in independent peer reviewed journals and

inside it through a Congressionally mandated review process. Further, the criticisms have since been discredited by subsequent reevaluations by an independent body -- the Health Effects Institute -- as well as by ample newly developing science. These criticisms were discredited as well through the crucible of litigation, ultimately resulting in a unanimous Supreme Court decision in favor of EPA. Too often, claims of flaws in EPA's science have been used by advocates to bolster mere policy disagreements.

Other changes being contemplated to EPA's structure -- while perhaps well-intentioned -- may suffer from perverse unintended consequences. For example, the feature of H.R. 2138, the bill introduced by the Chairman, that has regulatory development supervised by the Under Secretary for Policy and regional permitting activities supervised by the Under Secretary for Implementation (section 7) may lead to the loss of practical and common sense understanding in the on-the-ground consequences of proposed regulatory actions and further separation from state-based capabilities. Would the consolidation of science functions in a new Under Secretary (section 7) lead to its isolation in yet a different "stovepipe", as Administrator Whitman suggested in her testimony before this Subcommittee? Testimony of Administrator Whitman at 247 (July 16, 2002) ("My concern with establishing a Deputy Administrator for Science . . . is that science should be incorporated throughout the Agency. It should be part of every one of the Assistant Administrator's jobs. I don't want anyone thinking the Deputy Administrator for Science will take care of that.").

When I first came to EPA, in the mid-1990's, its websites received approximately 100,000 "hits" per year. Administrator Browner emphasized expanding citizens right-to-know, and today EPA's internet sites receive over 125 million hits per month. This reveals the central importance of environmental information and the public's thirst for more and better data. I recount this change, though, for a more fundamental and important reason. It is that EPA's charter -- its mission and its authorizing structure -- must remain fluid and nimble to respond to changes that we cannot today possibly foresee. How unfortunate it would have been to have locked the agency into a mission that would have precluded it from moving into the environmental information arena. Likewise, I urge extreme caution with any proposed mission because the unintended consequences of it down the road are far too difficult to fathom. Even today, a mission such as set out in H.R. 2138, limited to some vague notion of "unreasonable risk"(sec. 4(b)(2)), seems unfortunately value-laden and calculated to engender controversy. Would the new Department even be able to pursue some of the very areas of focus recommended by NAPA -- such as addressing climate change and non-point source pollutants -- under this implicit "unreasonable risk" standard?

There are numerous other important questions as well. The loss of Senate consultation in the appointment of the General Counsel (section 6) and the disparity with the approach for the chief financial and science officers of the new Department may instead diminish that official's ability to achieve consistent legal interpretations across offices and regions. Does the Chief Financial Officer really have the competence to address regulatory costs (section 7(g)(1))? Does not the creation of independent enforcement authority for the proposed Bureau of Environmental Statistics (section 8(d)(1)) create the possibility of inconsistent actions and interpretations by the new Department? How can the Bureau's mission of transparency be squared with an approach that withholds from the public any "corporately identifiable data" (section 8(h)(2))? Why should not other important issues be addressed during the reorganization, such as codifying a

commitment to protecting children's health based upon their scientifically demonstrated greater sensitivities and exposures?

Toward Improved Public Health and Environmental Outcomes

That is not to say that H.R. 2138 does not raise important issues about how EPA's operations can be improved. I agree generally with the need to further integrate science into agency resource prioritization and regulatory decisionmaking. I support the concept of an enhanced capacity for independent statistical data as well as for better program evaluation. I believe we need to enhance EPA's ability to move toward creative multi-media approaches, but without undermining the basic tenets of its existing authorities.

Each of these issues, though, is complex and deserves careful analysis and direction. Nor is it to say that Congress, EPA, state regulators, and concerned citizens are starting at the beginning in thinking about these issues, for much work already has been done. The change to cabinet status should provide the impetus for Congress to establish a more focused, high level commission that would report back to Congress for the consideration of changes to enhance the new Department's effectiveness.

Achieving Real Public Health and Environmental Protection

I would be remiss in my responsibility to the Committee if I did not root this discussion in the context in which it currently is occurring. I am very concerned -- and I believe the American people increasingly share this view -- that this effort will be regarded as nothing more than window dressing if we continue down the road the Administration is taking on the environment.

The Administration claims to want to empower states to carry out environmental protection, yet it undercuts them when their interests do not align neatly with its ideological agenda. Within just the last few weeks, EPA compelled states to adopt its controversial New Source Review changes, and the Solicitor General filed a brief in the Supreme Court in the diesel fleet rule case attempting to remove important tools that California uses to protect its citizens from that State's significant air pollution.

The Administration claims to support sound science, yet EPA removed a comprehensive discussion of global climate change from its effort to assess the state of the environment and it continues to ignore the findings made by the National Academy of Sciences -- at the Administration's request -- that climate change impacts are human induced and real. It has issued "gag" orders on perchlorate and not allowed EPA staff to conduct studies of mercury emissions.

The Administration has thwarted Congressional intention and removed any incentive for aging industrial facilities to be replaced by more efficient and better controlled ones through its New Source Review changes. It reversed the opinions of my predecessor and myself as General

Counsel that the Clean Air Act provides the authority to treat carbon dioxide as a pollutant by disingenuously claiming that Congress has effectively precluded consideration of this issue. It has revoked plans to accomplish watershed-based pollution planning through the tool presented by total maximum daily loads.

These are just a few examples of an approach that, seemingly at every turn, belittles environmental and public health protections. Achieving the historic step of elevating EPA to cabinet status -- however worthy -- cannot and will not obscure this most unfortunate record.

I thank the Committee for the opportunity to testify and would be pleased to answer any questions you may have.